

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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PRIZE FOR APPELLATE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,554

UNITED STATES OF AMERICA, APPELLANT

v.

United States Court of Appeals
for the District of Columbia Circuit

PAUL E. SMITH, APPELLEE

FILED OCT 19 1970

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RECEIVED AND ACKNOWLEDGED DATE: 10-19-70

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Cr. No. 1568-67

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ISSUES PRESENTED*

1. Whether a court in dismissing an indictment for unnecessary delay of trial, when the defendant is incarcerated, has authority to bar its reinstitution when the court prior to dismissing the indictment issued an order requiring the Government to try the case by a certain date.

2. Whether a District Court is justified in dismissing with prejudice an indictment when the Government fails to bring the case to trial on a particular date so ordered upon the express requirement of the Court and the defendant has been incarcerated for approximately 10 months.

* This case was before this Court previously on Appellee's Motion to dismiss this appeal for lack of jurisdiction and on August 28, 1969, was certified to the Supreme Court, on June 29, 1970, the Supreme Court returned this case to this Court for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22, 554

UNITED STATES OF AMERICA, APPELLANT

v.

PAUL E. SWEET, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The statement of the case as set forth in Appellant's brief herein is correct with the following exceptions: The defendant was arrested on October 13, 1967, and charged with the offenses as set forth in the indictment herein and released on \$2,000.00, bond. (A) 1/ On October 20, 1967, he was arrested and charged with the commission of an earlier offense (F). That following his arrest

1/ Material in the record relied on in support of assertions in the Counterstatement of the Case is designated by letters, the key to which is set forth in the Appendix to this brief.

on October 20, 1967, the defendant was never actually released from custody up to the time of the dismissal of the indictment herein on September 30, 1968. Although the record herein reflects that on January 23, 1968, the defendant was released on \$5,000.00 bond, satisfied by a \$500.00 deposit by his father (B, D, J, K), the defendant was never actually released from custody and remained incarcerated. This fact was brought to the attention of the Trial Court on August 30, 1968, at the hearing on the Motion to Dismiss for Want of Prosecution and/or Lack of Speedy Trial (U-3). The Appellant's brief herein reflects that the defendant was released on bond from January 23, 1968, when a \$500.00, deposit was posted by his father in satisfaction of the \$5,000.00, bond in Cr. No. 1512-67, (B, D, J, K), until March 1, 1968, when his bond was revoked and the \$500.00, deposit returned to his father on March 7, 1968, (B, D). But the defendant was never actually released from custody notwithstanding the \$500.00, deposited in Cr. No. 1512-67, from the date of his arrest on October 20, 1967, up to the time of the dismissal of the indictment on September 30, 1968, in Cr. No. 1568-67, due to the fact that the defendant's Parole Board had placed a detainer against him which prohibited his release from custody, his parole being revoked outright on February 20, 1968, (K-5, fn.).

Further, that on September 30, 1968, the Trial Court was informed by the parents of the defendant that a bench warrant had been issued for him, for his failure to appear for trial, at a time when the defendant was already incarcerated (Z), the Court having previously expressly required that the trial was not to take place later than September 30, 1968 (Z).

ARGUMENT

1. The trial court had ample authority to dismiss the indictment and bar its reinstitution for unnecessary delay of trial, when the defendant was incarcerated and prior to the dismissal had issued an order requiring the Government to bring the case to trial by a date certain.

Amendment VI, UNITED STATES CONSTITUTION, provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense".

Rule 48(b), FEDERAL RULES OF CRIMINAL PROCEDURE, provides:

"If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint".

Rule 87(m), as Amended, Sep. 1, 1966, of the Local Rules of the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, provides:

"If the Chief Judge determines that any case is not being given appropriate attention in accordance with provisions of Rule 48(b) of the Federal Rules of Criminal Procedure and the Sixth Amendment to the Constitution, he will call that matter to the attention of the United States Attorney to the end that the case be set for trial forthwith or otherwise disposed of as justice may require".

There can hardly be any question of whether the Court had authority to dismiss the indictment in Criminal No. 1568-67, for unnecessary delay in trial of the cause. The Court's authority derives from the Sixth Amendment to the Constitution; Rule 48(b) of the Federal Rules of Criminal Procedure and Rule 87(m), as Amended Sep. 1, 1966, of the Local Rules of the United States District Court for the District of Columbia. The real ques-

tion would seem to be whether under the circumstances of this case, the Court had authority in dismissing the indictment to bar its reinstitution by dismissing it with prejudice.

The Appellant in its brief relies strongly on the case of Mann v. United States, 115 U.S. App. D.C. 27, 304 F. 2d 594 (C.A.D.C. 1962, cert. denied, 371 U.S. 896, "generally" which the court held precluded dismissal of the indictment. However,, a review of the facts in the instant case shows that it is materially different from the Mann Case in many significant ways.

In the Mann Case, the defendant was responsible for several delays in bringing the case to trial at which time an essential document needed by the Government had been misplaced. On the day of trial, the Government attorney announced that he would not oppose an appropriate motion to dismiss. Defendant's attorney moved to have the case dismissed for want of prosecution. The court in granting the motion to dismiss told the Government attorney in the defendant's presence that he could reindict the defendant in the event the missing document was later found. In examining the record of the dismissal, this Court found that "the court clearly expressed its intent to award the dismissal without prejudice to further prosecution should the Government later uncover the missing evidence." This Court stated that a defendant at the time of dismissal of an indictment "is entitled to know whether the sword of Damocles still hangs over him".

This Court further states in Mann that "If the dismissal is granted pursuant to a finding that the speedy trial clause has been violated, the court should expressly dismiss with prejudice. Otherwise, the dismissal should note that it is awarded without prejudice to prosecution on a new indictment or information. Here the required warning was given, and under

the facts is was clearly a proper ruling."

In the instant case the trial court expressly dismissed the indictment with prejudice and would appear followed the mandate as stated by Mann. It can be strongly argued that the court found that the unnecessary delay of trial caused the defendant the kind of prejudice which justified an immunity from further prosecution for the following reason: On August 30, 1968, when defendant's Motion to Dismiss was heard before the Trial Court, the Motion was denied with the definite understanding that the Government would place the case on the ready calendar by September 10, 1968, (U, V.) 1/ At that time the Court stated to Defendant's counsel that in the event the case was not on the ready calendar by September 10, 1968, he could reinstitute his Motion to Dismiss (U). On September 10, 1968, the case had not been certified for trial and the Government was given an extension of time upon the express requirement that trial would not take place later than September 30, 1968 (Z. X-2). On September 30, 1968, the case still had not been tried, and the defendant having been incarcerated for more than 10 months the Court then dismissed the indictment with prejudice.

Appellee relies on the case of White v. United States, 126 U.S. App. D.C. 309, 377 F.2d 948 (1967), which held:

"Dismissal with prejudice of indictment charging defendant with unauthorized use of a vehicle constituted adjudication barring prosecution for same offense".

In a Per Curiam opinion this Court stated:

"An indictment of appellant for unauthorized use of a vehicle, in violation of D. C. Code, Title 22-2204, was dismissed by the District Court December 9, 1965. Upon consideration of the record relating to the dismissal we conclude that it was with prejudice. Nevertheless a few days thereafter, December 15, 1965, appellant was again indicted for the same offense. His motion to dismiss the second indictment due to the bar

1/ Material in the record relied on in support of assertions in the argument of this brief is designated by letters, the key to which is set forth in the Appendix hereto.

created by the earlier dismissal with prejudice was denied. We think it should have been granted. The dismissal with prejudice constituted an adjudication which barred another prosecution for the same offense. Appellant's conviction under the second indictment must be set aside and the case remanded for dismissal of that indictment.

Upon this Court's holding in White v. United States, the dismissal of Criminal No. 1568-67 with prejudice constitutes an adjudication which bars another prosecution for the same offense and should not be reversed. See, e.g., United States v. Oppenheimer, 242 U. S. 85, 37 S. Ct. 68, 61 L. Ed. 161; United States v. McWilliams, 82 U.S. App. D.C. 259, 260, 163 F.2d 695 (C.A.D.C. 1947); United States v. Gunther, 104 U.S. App. D.C. 16, 259 F.2d 173 (C.A.D.C. 1956); Williams v. United States, 102 U.S. App. D.C. 51, 250 F.2d 19, (C.A.D.C. 1957); Taylor v. United States, 99 U.S. App. D.C. 185, 238 F.2d 259, (C.A.D.C. 1956); District of Columbia v. Neams, 208 A.2d 617, 619 (D.C. Mun App.)

2. The District Court was justified in dismissing the indictment with prejudice where the Government failed to bring the case to trial on a certain date so ordered by the Court and defendant had been incarcerated for more than 10 months.

Appellee further contends that the Court's dismissal of criminal number 1568-67, was fully justified as a means of protecting his right to a speedy trial. At the time of the dismissal the defendant had been incarcerated for more than 10 months and on September 30, 1968, when the Court was informed that no trial was to take place that day and that a bench warrant had been issued against the defendant for his failure to appear for trial at a time when he already was in custody (Z), it is quite evident that the Court dismissed the cause to protect defendant's right to a speedy trial; for otherwise the defendant could have been "lost" in

jail while his whereabouts was being sought pursuant to a bench warrant.

Also an important part of protecting not only appellee's right to a speedy trial but to protect the rights of many others to speedy trials is to avoid congestion in court calendars. As the Supreme Court stated in *Link v. Wash R. R. Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734, rehearing denied, 371 U.S. 873, 83 S. Ct. 115, 9 L. Ed. 112 (1963):

"The authority of a federal court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin having its roots in judgments of non suit and NON prosecutur entered at common law The authority of a court to dismiss sua sponte for lack of prosecution has been considered an inherent power, governed not by rule or statute, but by control necessarily vested in court to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. . . . Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without providing an adversary hearing before action".

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment appealed from should be affirmed, and the Order dismissing Criminal No. 1568-67 with prejudice should stand.

Respectfully submitted,

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APPENDIX

- A. Complaint, District of Columbia Court of General Sessions, Oct. 14, 1967
- B. Docket, Criminal Case No. 1568-67
- C. Indictment, Criminal Case No. 1568-67, Dec. 20, 1967
- D. Docket, Criminal Case No. 1512-67
- E. District Court Jacket, Criminal Case No. 1512-67
- F. Warrant of Arrest, Criminal Case No. 1512-67, October 19, 1967
- G. Temporary Commitment, Criminal Case No. 1512-67, Oct. 20, 1967
- H. Final Commitment, Criminal Case No. 1512-67, Nov. 7, 1967
- I. Motion for Mental Examination, Criminal Case No. 1568-67, Jan. 15, 1968
- J. Order granting bond, Criminal Case No. 1568-67, Jan. 23, 1968
- K. Order granting bond, Criminal Case No. 1512-67, January 23, 1968
- L. Order of commitment to St. Elizabeth's Hosp. Cr. Case No. 1568-67, Feb. 2, 1968
- M. Order of commitment to Saint Elizabeth's Hospital, Criminal Case No. 1512-67, Feb. 2, 1968
- N. Letter to clerk, District Court, from St. Elizabeth's Hosp. May 6, 1968
- O. Order holding defendant competent to stand trial, Criminal Case No. 1512-67, May 21, 1968
- P. Order appointing counsel, Criminal Case No. 1512-67, May 21, 1968
- Q. Letter from assignment commissioner to defendant's counsel, Criminal Case No. 1512-67, May 23, 1968
- R. Motion by government for continuance, Criminal Case No. 1512-67, June 17, 1968
- S. Order granting continuance, Cr. Case No. 1512-67, June 17, 1968
- T. Motion to dismiss, Criminal Case No. 1568-67, Aug. 7, 1968
- U. Transcript of proceedings, Aug. 30, 1968, Cr. Case No. 1568-67
- V. Order denying motion to dismiss, Cr. Case No. 1568-67, Aug. 20, 1968
- W. Order dismissing indictment, Cr. Case No. 1568-67, Sep. 30, 1968
- X. Government's motion for reconsideration, Cr. Case No. 1568-67, Oct. 29, 1968
- Y. Affidavit of assistant assignment commissioner, Criminal Case No. 1568-67, October 25, 1968
- Z. Memorandum by court, November 5, 1968, Cr. Case No. 1568-67

* Appellee adopts by reference the above Appendix as set forth in Appellant's Brief.